UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**D-046** **RULING ON MOTION** TO DISMISS—SPEEDY TRIAL 20 July 2008

The Defense has moved this Commission to dismiss all charges and specifications with prejudice on the grounds that the accused has been denied a speedy trial guaranteed him under the Sixth Amendment to the Constitution. The Government opposes.

FACTS:

The accused was captured on the battlefield in Afghanistan on 24 November 2001 after being stopped at a road block with surface to air missile components in his vehicle. He has been detained as an enemy combatant since that date, although it is not clear when the notion of prosecuting him for war crimes arose. From that date until June 6, 2007, the United States and the accused have been engaged in a titanic struggle over those charges, including a trip to the Supreme Court, a victory there, special Congressional action as a result, and three separate attempts on behalf of the United States to create military commissions that could lawfully try him. Although the parties have not supplied the Commission with a detailed chronology, a few milestones are available in the public record:

The President designated him for trial by military commission on July 3, 2003;

Defense counsel was appointed for him on 18 December 2003;

The District Court for the District of Columbia granted Hamdan's request for a writ of habeas corpus, granting relief on November 8, 2004, 344 F. Supp. 2d 152 (DC 2004).

The Court of Appeals for the District of Columbia Circuit denied his petition on 11 February 2005, and reversed the District Court on 15 July 2005 415 F. 3d 33 (2005); 2005 U.S. App. LEXIS 14315.

The Supreme Court granted certiorari on 7 November 2005 546 U.S. 1002 (2005) and reversed on 29 June 2006.

Congress enacted the Military Commissions Act, P.L. 109-366 on October 17, 2006, authorizing trial by military commission for unlawful enemy combatants.

Charges against Mr. Hamdan in the instant case were sworn on 5 April 2007 and referred for trial on 10 May 2007. He was arraigned before this Military Commission, authorized under the Military Commissions Act of 2006, on 6 June 2007.

DOES THE SIXTH AMENDMENT PROTECT THE ACCUSED?

The Commission does not reach a Constitutional analysis of this motion because even assuming, *arguendo,* that the accused is entitled to the Constitutional right to a speedy trial, it has not been denied him under the facts of this case.

The seminal case in examining the right to a speedy trial is *Barker v. Wingo,* 407 U.S. 514 (1972) finding that the right to a speedy trial is a "fundamental right." However, unlike other Constitutional rights, the right to a speedy trial also encompasses a "societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Id.* at 522. "Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself." *Id.* The Court indicates that identification of a finite point in time when the right inures is difficult:

> "Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. . . . Thus, as we recognized in Beavers v. Haubert [citation omitted] any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:" *Id* at 521.

HAS THE ACCUSED BEEN DENIED A SPEEDY TRIAL?

In addressing the Government's compliance with the Constitutional guarantee, the Commission considers the four factors identified in *Barker v. Wingo,* 407 U.S. 514 (1972):

Length of the Delay: This case has transpired against a backdrop of actions by all three branches of our federal government that are unprecedented in our jurisprudence. The accused has undeniably been held by the United States since his capture in November of 2001, but he was not held by law enforcement authorities, but by the armed forces after having been captured in armed conflict, which detention is and has been pursuant to a "fundamental and accepted incident to war." Hamdan and others "captured while fighting against the United States in Afghanistan [may be detained] for the duration of that conflict as a fundamental and accepted incident to war." *Hamdi v. Rumsfeld*, 542 U.S. 507, (2004). On 3 July 2003, the President of the United States announced that Mr. Hamdan, among others, would be tried by a military commission- the first public indication that the Hamdan was considered other than a battlefield detainee. Thus began a convoluted and lengthy path that is only ending at this juncture. Along this trail have been decisions by various federal courts to include United States Supreme Court. The legislative branch has enacted two separate statutes with a view to establishing a constitutionally

permissible system for trying stateless enemies- the Detainee Treatment Act and the Military Commissions Act.

Thus, the seven year period of Hamdan's detention is not a measure of the delay in bringing him to trial, but a recognition that the conflict with and in Afghanistan continues. The length of delay is in favor of the Government.

Reason for the Delay: Once again, the reason for the delay is twofold: Hamdan is being detained as a battlefield detainee in an ongoing conflict, and hence he will continue to be detained whether this prosecution proceeds or not. Second, he has been the leading figure in challenging the United States' ability to try unlawful enemy combatants, and an active and successful litigant in our federal system as noted above. Both the President of the United States and the Secretary of Defense have troubled themselves to identify him by name as one whose case should be tried by military commissions.

Beyond this, the case is extraordinary in its scope and complexity. The prosecution of this case has involved a worldwide search for evidence carried on during a period of national emergency and threat, the declassification of documents, interagency cooperation with numerous other federal agencies, security clearances for defense counsel, the creation of entirely new organizations of trial and defense counsel, and a host of other administrative issues not present in any other federal or military prosecution. Thus, both sides have been actively preparing for trial since the notion of prosecuting Hamdan was first conceived. This factor weighs in favor of the Government.

Demands for Speedy Trial: The accused submitted a demand for speedy trial on February 12, 2004, and he was served with charges on July 9th of that year. Thus, with respect to the first attempt to bring him to trial, he made a demand for speedy trial and it was granted. The accused has made no further demands for speedy trial in the four years since that date. Between June of 2006 and May of 2007, the accused was not facing any pending charges. Since the current charges were referred on that date, the Defense has not made any demand for speedy trial, has affirmatively waived the issue of speedy trial on the record, has requested several continuances, and has had its continuances granted liberally to accommodate the schedules of members of the Defense team. His arraignment on 6 June occurred within 30 days after the charges were referred against him, satisfying the rule of RMC 707. This factor weighs in favor of the Government.

Prejudice: The accused notes that prevention of oppressive pretrial incarceration, minimization of the accused's anxiety and concern, and minimization of the possibility that a delay will hinder the defense are interests that the "speedy trail right was designed to protect." These factors are helpful guides in civilian criminal cases where the accused is apprehended only after he has been accused of a crime, and only for the purpose of answering those charges, but they are not dispositive here. For one thing, many others detained with him continue to be held with no charges referred against them, and Hamdan has been held as a battlefield detainee even during long periods when he was facing no charges. Thus, the interest in preventing excessive pretrial incarceration, with its attendant anxiety and concern, does not help the accused much here. His incarceration at Guantanamo Bay is not for the sole purpose of ensuring his purpose at trial.

With respect to prejudice, the Commission accepts the declaration that his family in Yemen is destitute, that he has been held for nearly seven years, and that he suffers mental and physical effects of his incarceration. But the Defense has not shown that any of this prejudice occurred only because one of the reasons for his detention is the trial. It is widely known that many other detainees at Guantanamo Bay are held because they are believed to represent a continuing threat to the Security of the United States ongoing combat operations abroad, and others are being held because their own countries have refused to accept their return. In fact, the delay in finally getting Mr. Hamdan to trial has produced at least one unlooked-for boon to his defense: the United States has located, captured, and brought to Guantanamo Bay no less than eight high ranking al-Qaeda leaders, several of whom are believed ready to provide exculpatory evidence on the accused's behalf. This factor weighs in favor of the Government.

The balance of the *Barker v. Wingo* factors results in all of the pertinent factors being in the favor of the Government. The Commission concludes by a preponderance of the evidence that whatever Constitutional right to a Speedy Trial the accused may have, it has not been violated.

CONCLUSION AND RULING

The accused has not been denied a speedy trial within the meaning of the Constitution, even assuming that it protects him. The Motion to Dismiss is DENIED.

Keith J. Allred
Captain, JAGC, USN
Military Judge

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**Defense Motion** to dismiss for denial of a speedy trial 2 July 2008

1. Timeliness: This motion is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's order dated 26 June 2008.

2. Relief Sought: Defendant Salim Ahmed Hamdan requests that the Commission dismiss the charges with prejudice as a result of the government's failure to guarantee him a speedy trial.

3. Overview: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…." U.S. CONST. amend. VI. Mr. Hamdan has been denied the Sixth Amendment's guarantee to a speedy and public trial where he has been held for nearly seven years without trial.

4. Facts:

A. Mr. Hamdan was captured somewhere in Afghanistan by U.S. forces on or about 24 November 2001.

B. President Bush designated Mr. Hamdan for trial by military commission on July 3, 2003.

C. On December 18, 2003, Lieutenant Commander Charles Swift was detailed to serve as Mr. Hamdan's military defense counsel.

D. On February 12, 2004, Lieutenant Commander Swift filed a demand for charges and speedy trial under the Uniform Code of Military Justice (Appendix A).

E. On July 9, 2004, Mr. Hamdan was formally charged with conspiracy to commit the following offenses: attacking civilians; attacking civilian objects; murder by

an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

F. On June 29, 2006, the Supreme Court ruled that the military commission established to try Mr. Hamdan was illegal. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

5. <u>Law and Argument</u>:

A. The Sixth Amendment's Speedy Trial Guarantee Applies at Guantanamo Bay

In the course of holding that the Suspension Clause applies in Guantanamo Bay, *Boumediene v. Bush*, ___ U.S. ___ (2008) (slip op.), the Supreme Court laid out the analytical framework for determining the extraterritorial applicability of other constitutional rights as well. The Court had long recognized that "even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants 'guaranties of certain fundamental personal rights declared in the Constitution.'" *Id*, slip op. at 23 (*quoting Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)). Distilling the relevant precedents from the Insular Cases through *Johnson v. Eisentrager*, 339 U.S. 763 (1950) and *Reid v. Covert*, 354 U.S. 1 (1957), Justice Kennedy concluded for the majority that the extraterritorial effect of a particular constitutional provision turned on "objective factors and practical concerns, [and] not formalism." *Boumediene*, slip op. at 26. A speedy trial is a fundamental right of an accused. *Barker v. Wingo*, 414 U.S. 919, 920 (1972); *Moore v. Arizona*, 414 U.S. 25, 28 (1973)("[T]he right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.")

In the Insular Cases, the "Court held that the Constitution has independent force in [foreign territories held by the United States], a force not contingent upon acts of legislative grace." *Boumediene*, slip. op. at 27. These cases make clear that the question before this Court is not whether the Constitution applies to Mr. Hamdan, but which of its provisions are "applicable by way of limitation upon the exercise of executive and legislative power in dealing

with new conditions and requirements." *Boumediene*, slip op. at 28 (*citing Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)).

In determining the applicability of a specific constitutional provision, the Supreme Court looked primarily at the practical difficulties of enforcing "all constitutional provisions 'always and everywhere….'" *Boumediene*, slip op. at 29. In *Dorr v. United States*, 195 U.S. 138 (1904), the Court found that the Sixth Amendment's requirement that a defendant be tried by a jury of twelve members did not apply in the American-occupied Philippines because "a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary." *Boumediene*, slip op. at 27. By contrast, in *Rassmussen v. United States*, 197 U.S. 516 (1905), the Court found that the Sixth Amendment did extend to that territory in large part because the territory was sparsely populated by American settlers, conditions which were perceived to guarantee a relatively easy governance and assimilation. *See Balzac*, 258 U.S. at 309. Extension of the jury right to Alaskans presented "none of the difficulties which incorporation of the Philippines and Porto Rico presents…." *Id.*

The *Boumediene* Court also noted that "over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance." *Boumediene*, slip op. at 28. The Court cited with approval Justice Brennan's concurring opinion in *Torres v. Puerto Rico*, 442 U.S. 465, 475-476 (1979) that holdings in several of the Insular Cases that the Constitution had limited application in Puerto Rico at the turn of the 20th century were no longer "authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's." *Id.* It is worth mentioning here that Guantanamo Bay was occupied by the United States at the same time as Puerto Rico in 1898. But unlike Puerto Rico, the lack of potable water ensured that the

territory now comprising Guantanamo Bay has never had an indigenous population with a local language, customs, and judicial system.[1]

In *Boumediene*, the Court applied three factors arising from earlier precedents involving the extraterritorial application of the Constitution in determining the extraterritorial reach of the Suspension Clause:

> (1) the citizenship and status of the detainee and the adequacy of the process through which that that status determination was made;
>
> (2) the nature of the sites where apprehension and then detention took place;
>
> (3) the practical obstacles inherent in resolving the prisoner's entitlement to right.

An application of these factors to the facts of this case indicates that the Sixth Amendment's guarantee of a speedy and public trial applies to Mr. Hamdan.

Citizenship and Status of Mr. Hamdan

While Mr. Hamdan is a citizen of Yemen, Mr. Hamdan continues to dispute that he is an unlawful enemy combatant. In *Boumediene*, the Court noted that in *Johnson v. Eisentrager*, 339 U.S. 763 (1950) the defendants did not contest the fact that they were enemy aliens. *Boumediene*, slip op. at 37. And while this Court has found by a preponderance of the evidence that Mr. Hamdan is an unlawful enemy combatant, this finding was made before the Prosecution completed discovery. The Prosecution has since discovered to the Defense evidence and witnesses that cast serious doubt on this Court's December 19, 2007, ruling that Mr. Hamdan is an unlawful enemy combatant. Nevertheless, the fact that Mr. Hamdan is not a citizen of the United States is a factor this Court should consider in determining the applicability of the Sixth Amendment's guarantee that all persons be afforded a speedy and public trial. But citizenship is not the only factor to be considered in determining the reach of a particular constitutional

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1 **https://www.cnic.navy.mil/Guantanamo/AboutGTMO/gtmohistgeneral/gtmohistmurphy/gtmohistmurphyvol1/gtmohistmurphyvol1index**

provision. *Boumediene*, slip. op. at 32. Neither *de jure* sovereignty over the location of the proceeding nor the citizenship of the defendant is dispositive of the constitutional question. *Boumediene*, slip op. at 24 (citizenship), 26 (sovereignty). Practical considerations "weigh heavily" in making such a determination. *Boumediene*, slip. op. at 32, 34.

The Nature of Cites of Apprehension and Detention

Mr. Hamdan was captured somewhere in Afghanistan on or about November 24, 2001. Shortly thereafter, Mr. Hamdan was transferred to a prison at Guantanamo Bay, Cuba. The control over that prison by the United States is both "absolute" and "indefinite." *Boumediene*, slip. op. at 38. In *Boumediene*, the Court reaffirmed long-standing precedent that full extension of constitutional protections was not necessary in territories the United States did not intend to govern indefinitely. *Boumediene*, slip. op. at 39. "Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *Id.* That conclusion was based on the pragmatic realities of the United States's control over Guantanamo and not on any special characteristic of the habeas corpus right. Accordingly, for purposes of the instant motions, the availability of the rights at issue should be determined no differently than if the commission proceedings were occurring on the United States's sovereign territory.[2] Unlike the situation in *Eisentrager* and the Insular Cases, Guantanamo Bay has been under the exclusive jurisdiction of the United States since 1898. Today, "the only long-term residents are American military personnel, their families, and a small number of workers." *Boumediene*, slip. op. at 40.

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[2] To the extent that the government deliberately chose to hold Mr. Hamdan's trial at Guantanamo in order to avoid the applicability of the Constitution, that is an independent basis for rejecting its position. "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Boumediene*, slip op. at 27.

The Practical Obstacles Involved in Resolving the Prisoner's Entitlement to the Right

The Defense is unable to identify any credible obstacles to the application of the Sixth Amendment's guarantee of a speedy and public trial. The prison at Guantanamo Bay is far from any battlefield, and the United States is "answerable to no other sovereign for its acts on the base." *Boumediene*, slip. op. at 41. Unlike in *Boumediene*, where the Court rejected the government's argument that application of the Great Writ was cost prohibitive, there are no "practical barriers" to the Sixth Amendment's guarantee to a speedy and public trial costs nothing. *Id.*

In sum, neither the government's decision to hold Mr. Hamdan's trial at Guantanamo Bay nor any legitimate national security interests render "judicial enforcement of [Mr. Hamdan's constitutional rights] . . .'impracticable and anomalous.'" *Id.* (*quoting Reid*, 354 U.S. at 74-75 (Harlan, J., concurring)). What is entirely "anomalous" from the perspective of *Boumediene* and the earlier cases – and what is mandated by no legitimate "practical necessity" – is rather the government's stated view that Mr. Hamdan has no constitutional protections at all in a judicial proceeding that is created by Congressional statute, that is held on *de facto* American territory, and that charges him with crime and seeks to deprive him of liberty.

The Court's Holding in *Boumediene* is not Restricted to the Suspension Clause

In its opposition to the Defense Motion for a Continuance, D042, the Prosecution characterizes one sentence from the seventy-page ruling as the holding of the case:

> Our decision today holds only that the petitioners before us are entitled to the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that the petitioners in these cases need not exhaust the review procedures of the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA § 7, 20 U.S.C. § 2241(e)(2006).

Boumediene, slip op. at 66. This sentence is taken wholly out of context from a subsection of the opinion addressing the continued validity of the Combatant Status Review Tribunal process. The very next sentence, omitted by the Prosecution, puts this language in context: "Accordingly, both the DTA and the CSRT process remain intact." *Id.*

The Prosecution's argument that this one sentence constitutes the holding of *Boumediene* is strikingly similar the Prosecution's argument, which has been often repeated during the past year, that a single sentence in *Eisentrager* stands for the proposition that the Constitution has no application at Guantanamo Bay. *See, e.g.* Prosecution Response to Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction (Ex Post Facto) at 4 (Stating Mr. Hamdan "possesses no rights under the Constitution" because he was similarly situated to the prisoners in *Eisentrager* who "at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States."(emphasis added)).

In *Boumediene*, the Court quickly dispensed with this argument. "First, we do not accept the idea that the above-quoted passage from *Eisentrager* is the only authoritative language in the opinion and that all the rest is dicta." *Boumediene*, slip op. at 33. "We cannot accept the Government's view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only consideration in determining the geographic reach of the Constitution or of habeas corpus." *Id.* This Court should reject the Prosecution's most recent argument that the above quoted passage from *Boumediene* is the only authoritative language in the opinion and that the remaining seventy pages are dicta. This Court cannot ignore the Supreme Court's extensive discussion affirming the extraterritorial application of the Constitution, a discussion that was not limited to the extraterritorial reach of the Suspension Clause alone. *See, Boumediene*, slip op. at

12, 25, 27, 28, 35, 41, 70 ("Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles")("The Court has discussed the issue of the Constitution's extraterritorial application on many occasions.")("In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State.")("…the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace.")("…the Government of the United States was bound to provide noncitizen inhabitants 'guarantees of certain fundamental personal rights declared in the Constitution.")("Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject to 'such restrictions as are expressed in the Constitution…To hold the political branches have the power to switch the Constitution on or off at will is quite another.")("It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.")("The laws and Constitution are designed to survive, and remain in force, in extraordinary times.").

It is true that in *Boumediene* the Court only declared the Suspension Clause to have extraterritorial application to the prisoners at Guantanamo Bay. The cannon of constitutional avoidance required the Court to answer only the question posed to it. But the framework utilized to answer this question, in concert with the Court's reaffirmation its jurisprudence involving the extraterritorial application of the Constitution, cannot be ignored. Unlike the territories and foreign colonies addressed in the Insular Cases, "Guantanamo is not abroad; it is within the constant jurisdiction of the United States." *Boumediene*, slip op. at 39. The Prosecution's

argument that one sentence of the Constitution applies to Mr. Hamdan, and that he is not even entitled the fundamental rights guaranteed to foreign nationals in the Insular Cases, is wholly without merit. Mr. Hamdan is for all intents and purposes being held in the United States, and he is entitled to the fair-trial protections of the Constitution.

B. The Government has Failed to Provide Mr. Hamdan with a Speedy Trial

The right to a speedy trial is a "fundamental" right guaranteed by the Sixth Amendment. *Barker v. Wingo*, 407 U.S. 514, 515 (1972). In addition to the Sixth Amendment, timely processing is also subject to assessment under the Due Process Clause of the Fifth Amendment. *United States v. Reed*, 41 M.J. 449, 451-52 (C.A.A.F. 1995). In determining whether there has been a violation of the Sixth Amendment right to a speedy trial, courts balance the four factors announced in *Barker*:

> (1) the length of the delay;
> (2) the reasons for the delay;
> (3) petitioner's assertion of his right to a timely review, and;
> (4) whether the delay prejudiced the petitioner.

An application of the facts in this case to the four *Barker* factors demonstrates that Mr. Hamdan has been denied a speedy trial.

Length of Delay

The first factor in determining whether a speedy trial violation exists serves as a triggering function; unless some presumptively prejudicial period of delay occurred, a court need not conduct the remainder of the analysis. *Martin v. Sec'y*, 262 Fed. Appx. 990, 994 (11th Cir. 2008). Mr. Hamdan was captured by U.S. forces operating somewhere in Afghanistan exactly six years, seven months, and eight days ago. He has thus been held incarcerated by the United

States or its allies for 2412 days. A delay of more than six years between arrest and trial is presumptively prejudicial and is sufficient to trigger the *Barker* inquiry. *See United States v. Brown*, 169 F. 3d 344, 348-49 (6th Cir. 1999)(noting that delays over one-year are presumptively prejudicial); *United States v. Schlei*, 122 F. 3d 944, 987 (11th Cir. 1997)("A delay is considered presumptively prejudicial as it approaches one year" from indictment to trial.)

Reasons for the Delay

The nearly all of the delay in this case is attributable to the government. Mr. Hamdan was confined for more than two years, seven months, and fifteen days before he was charged by the government on July 9, 2004. The record is silent as to why it took more than two years to bring Mr. Hamdan to trial before a military commission that has determined to be illegal. Most of the remaining delay has been the direct result of the Prosecution's attempt to try Mr. Hamdan by an illegal military commission or its continuing effort to deny Mr. Hamdan the constitutional rights to which all persons held in U.S. custody in U.S. territory are entitled.

This Commission approved 130 days of delay attributable to the Defense in its December 20, 2007 Order. On May 16, 2008, this Court granted a Defense request for an additional 57 days of delay attributable to the Defense. On June 26, 2008, this Court denied a Defense request for an additional sixty-three days to brief legal and evidentiary issues raised by the Supreme Court's decision in *Boumediene v. Bush*, ___ U.S. ___ (2008). Thus, the Defense is responsible for 187 days of delay out of 2412 days of delay as of this filing. This factor weighs heavily in Mr. Hamdan's favor.

Assertion of the Right

Mr. Hamdan first demanded a speedy trial on February 12, 2004-more than four years ago and less than two months after counsel was detailed to his case. This factor weighs heavily in Mr. Hamdan's favor.

Prejudice

Courts look to three interests that the "speedy trial right was designed to protect" when assessing prejudice:

> (1) prevention of oppressive pretrial incarceration;
> (2) minimization of the accused's anxiety and concern;
> (3) minimization of the possibility that a delay will hinder the defense.

Barker, 407 U.S. at 532. "[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett v. United States*, 505 U.S. 647, 655 (1992). "While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay." *Doggett*, 505 U.S. at 656.

"Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). Mr. Hamdan has been incarcerated for nearly seven years without trial. The government has publicly accused him of being a member of Al Qaeda. His wife and two children are destitute, and they rely entirely upon family members for financial support. As addressed fully in the Defense motion for Relief from Punitive Conditions of Confinement, D019, Mr. Hamdan is also suffering from severe

mental illness as a result of nearly seven years of oppressive incarceration. This factor weighs heavily in favor the Mr. Hamdan.

In the alternative, if Appellant has not been actually prejudiced by the delay of his appeal, a balancing of the other three factors indicates that the delay in this case is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). While *Toohey* was an appellate case, the reasoning of the Court of Appeals for the Armed Forces in that case is equally applicable to a trial before military commission.

Each of the four *Barker* factors weighs in Mr. Hamdan's favor. Dismissal is required in this case.

6. Request for Oral Argument: The Defense requests oral argument. Oral argument is necessary to provide the Commission with the opportunity to fully explore the legal issues raised by this motion. As provided by R.M.C. 905(h), "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

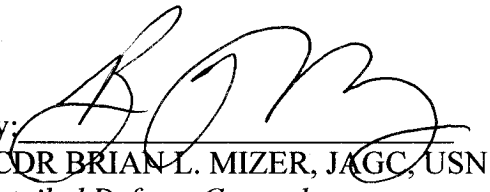
7. Request for Witnesses: At this time, the Defense does not anticipate calling live witnesses. The Defense reserves the right to amend its request should the Prosecution response raise issues that would require Defense witnesses to rebut.

8. Conference with Opposing Counsel: The Defense has conferred with opposing counsel. The Prosecution objects to the requested relief.

9. Attachments:

A. Memorandum Opinion (D.D.C. 2004).

Respectfully submitted,



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UNITED STATES OF AMERICA	**D-046**
v.	**GOVERNMENT'S RESPONSE**
SALIM AHMED HAMDAN	**To the Defense Motion to Dismiss (Speedy Trial)**
	10 July 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 7 July 2008.

2. Relief Requested: The Government respectfully submits that the Defense motion to dismiss all charges based on an alleged Sixth Amendment violation should be denied. In reaching that conclusion, the Government respectfully requests that the Military Judge rule *both* that the Speedy Trial Clause does not apply to the accused, *and* that, even if it does, the accused's rights have not been violated by his detention.

3. Overview:

a. As this Commission correctly held, the Supreme Court's holding in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), was "limited and narrow, and clearly based upon the most unusual circumstances that led to it." *United States v. Hamdan*, D-042 Ruling on Motion for Additional Continuance, at 1 (26 June 2008). This Commission further held that "[i]t is not clear, and the Court did not hold, that any other provision of the constitution will protect the detainees at Guantanamo Bay." *Id.* This Commission is correct that the Court's holding in *Boumediene* did not reach the Sixth Amendment claims that the accused would derive from it.

b. Moreover, even if the Sixth Amendment's Speedy Trial Clause does apply to the accused in this case, the accused's treatment fully complies with the Constitution in general, and the Speedy Trial Clause in particular. Under the controlling speedy trial standard articulated by the Supreme Court, *see, e.g.*, *Doggett v. United States*, 505 U.S. 647, 651 (1992); *Barker v. Wingo*, 407 U.S. 514, 530 (1972), even if the accused were to possess rights under the Speedy Trial Clause, those rights have not been violated because the accused has suffered no prejudice by his continued detention, since under the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the accused may be detained for the duration of hostilities, even in the absence of charges. Moreover, to the extent the delay in bringing this matter to trial impacts the parties' ability to present evidence, it is *the Government* that has been prejudiced since it is the Government's burden to prove the accused's guilt beyond a reasonable doubt. *See* 10 U.S.C. § 949*l*(c)(4) ("[T]he burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States."). Finally, much of the delay in the present matter is attributable to the litigation strategy of the accused and his defense team, who seem intent on preventing this matter from ever being heard by a jury. Weighing all

these factors together, the accused falls woefully short of presenting a Sixth Amendment violation. Accordingly, the motion to dismiss should be denied.

4. Burden of Persuasion: As the moving party, the Defense bears the burden of persuasion on this motion. *See* Rule for Military Commissions ("RMC") 905(c)(2)(A).

5. Facts:

a. The Prosecution does not controvert the Defense's factual description on pages 1 - 2 of its motion.

6. Discussion:

a. An alien enemy combatant, such as the accused, who has been charged under the MCA, has no rights under the Speedy Trial Clause of the Sixth Amendment.

i. The Speedy Trial Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." This right, however, does not extend to alien enemy combatants, such as the accused, who are detained at Guantanamo Bay, Cuba, to be tried for war crimes.

ii. In *Boumediene*, the Supreme Court addressed a narrow question—whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay, who are being held based solely upon the determination of a Combatant Status Review Tribunal. The Court concluded that uncharged enemy combatants at Guantanamo Bay must, after some period of time, be afforded the right to challenge their detention through habeas corpus. In reaching that conclusion, the Court considered both the historical reaches of the writ of habeas corpus, *see id.* at 2244-51, and the "adequacy of the process" that the petitioners had received. The Court signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants tried by military commission.

iii. To the contrary, the Court emphasized that "[i]t bears repeating that our opinion does not address the content of the law that governs petitioners' detention." *Boumediene*, 128 S. Ct. at 2240; *see also id.* at 2277. The Court emphasized that the petitioners in that case had been held for over six years without ever receiving a hearing before a judge, *see id.* at 2275, and the Court specifically contrasted the circumstances of the petitioners with the enemy combatants in *Quirin* and *Yamashita* who had received a trial before a military commission (albeit under procedures far more circumscribed than those applying here). The Court noted that it would be entirely appropriate for "habeas corpus review . . . to be more circumscribed"— if the court were in the posture of reviewing, not the detention of uncharged enemy combatants, but those who had held a hearing before a judgment of a military commission "involving enemy aliens tried for war crimes." *See id.* at 2270-71.

iv. *Boumediene* thus was a decision concerning the separation of powers under the Constitution and the role that the courts may play, under the unique

circumstances of the detention at Guantanamo Bay, in providing for the judicial review of the detentions of individuals who had not received any adversarial hearing before a court or military commission. *See Boumediene*, 128 S. Ct. at 2259 ("[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers."). In considering whether the Suspension Clause would apply, *Boumediene* articulated a multi-factored test of which the first factor required consideration of "the detainees' citizenship and status and the adequacy of the process through which status was determined." *See id.* at 2237. In this case, there is no dispute that Hamdan is an alien, and he is being tried before a military commission established by an Act of Congress and with the panoply of rights secured by the MCA. The Commission has already determined Hamdan's status, after a full and fair adversarial hearing before the military judge. Thus, *Boumediene* does not even provide the Defendant with any rights under the Suspension Clause. It goes without saying that he may not lay claim to any of the other individual rights secured by the Constitution.

v. Indeed, even if the Defense could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Supreme Court's decision did not, in any terms, upset the well-established holding, recognized previously by the Commission, that the Fifth Amendment and other individual rights principles of the Constitution do not apply to alien enemy combatants lacking any voluntary connection to the United States. The Supreme Court has recognized that the writ of habeas corpus historically has had an "extraordinary territorial ambit." *See Rasul v. Bush*, 542 U.S. 466, 482 n.12 (2004). By contrast, the Court has made clear—in precedents that *Boumediene* did not question—that the individual rights provisions of the Constitution run only to aliens with a substantial connection to our country and not to alien enemy combatants detained abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *see also Johnson v. Eisentrager*, 339 U.S. 763 (1950) (finding "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses").

vi. Indeed, even when an alien is found within United States territory (as was the nonresident alien in *Verdugo-Urquidez*) the degree to which constitutional protections apply depends on whether the alien has developed substantial *voluntary* contacts with the United States. *Id.* at 271. The accused's contacts with the United States, which consist solely of unlawfully waging war against the nation and being detained in a U.S. military base, "is not the sort to indicate any substantial connection with our country." *Id.*; *see Eisentrager*, 339 U.S. at 783 (finding "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"). As the *Eisentrager* Court explained, "[i]f [the Fifth] Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers" because "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans." *Id.*

vii. *Boumediene*'s holding was premised on the unique role of habeas corpus in policing the separation of powers in our constitutional system, *see Boumediene*, 128 S. Ct. at 2259, and on a factual difference between *Eisentrager*'s petitioners and those in *Boumediene*: the former did not contest their *status* as enemy combatants; the latter did so contest their status and thus required a remedy in habeas. *See id.* Nothing in *Boumediene*, however, casts doubt on *Eisentrager*'s well-established (and subsequently applied) denial that the Constitution applies *in toto* to nonresident aliens. *Boumediene* certainly does not extend the Constitution's individual-rights protections, contrary to *Eisentrager*, *Verdugo-Urquidez* and other cases, to alien unlawful enemy combatants before congressionally-constituted military commissions. To paraphrase the *Boumediene* Court itself, "if the [petitioner's] reading of [*Boumediene*] were correct, the opinion would have marked not only a change in, but a complete repudiation of" long-standing precedent. *Id.* at 2258. Because the Supreme Court did not disturb those holdings in *Boumediene*, they remain binding precedent before this Commission. As the Court explained in *Agostini v. Felton*, 521 U.S. 203 (1997), "if a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 237-38 (quotation omitted). Thus, the recognition that *Boumediene* did not overrule those cases is sufficient in and of itself to deny the Defense's motion.

viii. Contrary to *Agostini*, the Defense would read *Boumediene* as, *sub silentio*, overruling the Court's existing precedents and providing a multi-factored test for the analysis of other constitutional rights. It is clear, however, that the test enunciated by the Court to determine whether the Suspension Clause applied to the *Boumediene*-petitioners was specifically geared to measuring whether the Suspension Clause—and not any other constitutional provision—applies to those petitioners. *See id.* at 2237. That three-part test was clearly intended by the Court only to resolve the "limited and narrow," *Hamdan*, D-042 Ruling on Motion for Additional Continuance, at 1, issue before it, and is therefore inapposite to the question of whether others portions of the Constitution apply to alien detainees at Guantanamo.

ix. Even so, under that functional analysis endorsed in *Boumediene* for purposes of the Suspension Clause, it is clear that enemy aliens abroad do not come within the protection of the Sixth Amendment. The Government has broad latitude when it operates in the international sphere, where the need to protect the national security and conduct our foreign relations is paramount. *See Haig v. Agee*, 453 U.S. 280, 292, 307-308 (1981); *see also Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (holding that, in applying constitutional scrutiny to challenged Executive action within the United States, court must give particular deference to political branches' evaluation of our interests in the realm of foreign relations and selection of means to further those interests). In the international arena, distinctions based on alienage are commonplace in the conduct of foreign affairs. *See, e.g., DKT Memorial Fund, Inc. v. Agency for International Development*, 887 F.2d 275, 290-291 (D.C. Cir. 1989) (recognizing that the government speaks in the international sphere "not only with its words and its funds, but also with its associations"). Drawing a distinction between aliens abroad, on the one hand, and those who make up part of our political community,

on the other hand, is a basic feature of sovereignty. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Foley v. Connelie,* 435 U.S. 291, 295-296 (1978); *cf. Mathews v. Diaz*, 426 U.S. 67, 80, 85 (1976) (recognizing that it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status and to "take into account the character of the relationship between the alien and this country"). In this context, application of the Sixth Amendment to limit the political branches' treatment of aliens abroad would improperly interfere with those branches' implementation of our foreign policy and their ability to successfully prosecute a foreign war.

x. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice O'Connor, writing for a plurality of the Justices, determined that a U.S. citizen detained as an enemy combatant (to say nothing of an *alien* unlawful enemy combatant) could be detained, without charges, for the duration of hostilities, provided that he was afforded a process to challenge his detention before a neutral decisionmaker. *See id.* at 518 (plurality op.) ("We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."); *id.* at 519 (plurality op.) ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."); *id.* at 521 (plurality op.) ("The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'"). The detention approved by the Court in *Hamdi* is not "pretrial detention." Rather, it is detention authorized by Article II of the Constitution and the congressionally passed Authorization for Use of Military Force, Pub L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) ("AUMF") ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

xi. Requiring the U.S. Government to "try or release" citizen detainees held within the territorial jurisdiction of the United States was the view advocated by two dissenting Justices in *Hamdi*. *See Hamdi*, 542 U.S. at 554-79 (Scalia, J., dissenting, joined by Stevens, J.). That, however, was a minority position. Moreover, Justice Scalia specifically cabined his dissent to the rights of *citizen* enemy combatants held within the territorial jurisdiction of a federal court, and suggested that *alien* enemy combatants or those held outside the United States would enjoy far less protection. *See id.* at 577 (Scalia, J., dissenting) ("Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. . . . Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different.").

xii. The accused has been detained under procedures in effect approved by the Court in *Hamdi*. His detention is an incident to the United States' war with al Qaeda, and that detention has prevented Hamdan from returning to the battlefield on which he was captured with "two SA-7 missiles, suitable for engaging airborne aircraft." *United States v. Hamdan*, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, at 4 (Mil. Comm'n 19 Dec. 2007). To require the United States to "charge or release" alien enemy combatants held outside the United States would be effectively to overrule the procedures approved in *Hamdi*, which permit the United States to hold enemy combatants for the duration of hostilities, insofar as an opportunity is afforded them to challenge the basis for their detention. By virtue of the Combatant Status Review Tribunal and the Administrative Review Board, as well as the subsequent finding by this Commission that the accused is an alien unlawful enemy combatant, Hamdan has been afforded a process to challenge the basis for his detention, and his detention accordingly complies fully with the procedures approved in *Hamdi*.

xiii. Under the functional analysis employed in *Boumediene* to determine the application of the Suspension Clause, it is clear that the Sixth Amendment speedy trial right should not be applied to military commission proceedings of alien enemy combatants at Guantanamo. The "practical obstacles inherent" in application of the Speedy Trial Clause in this context, *see Boumediene*, 128 S. Ct. at 2237, are evident. Requiring the United States Government to prosecute alien war criminals abroad within the stringent time limitations that apply to domestic criminal prosecutions, despite the military and practical exigencies that apply in this quite different context, would severely handicap the Executive's ability to wage war and to bring to justice those who violate the laws of war. Under the accused's argument, the two million enemy soldiers held as prisoners of war during and after World War II would have all been entitled to speedy trial protections, notwithstanding the impossibility of conducting war crimes trials for those soldiers—especially in the midst of active, ongoing hostilities—on the same time frame as a run-of-the-mill domestic criminal prosecution.

xiv. Even as to U.S. citizens detained within the borders of this country, to whom the Due Process Clause clearly applies, the Supreme Court has emphasized the need to take into account military exigencies, and to tailor otherwise applicable constitutional protections, in order to "alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Hamdi*, 542 U.S. at 533-534 (plurality op.). The Supreme Court has also recognized that military exigencies may justify tolling of applicable civil and criminal limitations periods, without regard to the Ex Post Facto Clause. *See Stognar v. California*, 539 U.S. 607, 621 (2003); *see also Stewart v. Kahn*, 11 Wall. 493, 503-504, 20 L. Ed. 176 (1871) (upholding tolling statute as valid exercise of Congress' war powers). More directly on point—and highly persuasive for purposes of this case—the Supreme Court has recognized in the *Insular Cases* that not all constitutional trial rights apply even within U.S. sovereign territory where their application would be impracticable. *See, e.g., Balzac v. People of Porto Rico*, 258 U.S. 298, (1922) (holding that jury trial right did not apply in sovereign U.S. territory of Puerto Rico, relying heavily on the practical difficulties of applying this right in a "distant ocean communit[y] of a different origin and language from those of" the continental United States); *Dorr v. United States*, 195 U.S. 138, 145 (1904) (noting that

jury trial right was held not to apply in the Philippines on the basis that the territory was "wholly unfitted" for application of that constitutional provision and application of the right was, under the circumstances, both unnecessary and impracticable); *Ocampo v. United States*, 234 U.S. 91 (1914); *Hawaii v. Mankichi*, 190 U.S. 197 (1903). If practical considerations weighed against application of the jury trial right in Puerto Rico and the Philippines, then the even more significant practical impediments at issue in the context of this case surely preclude recognition of a Sixth Amendment speedy trial right on the part of an alien enemy combatant being tried abroad for war crimes. And even if this Court were to hold that alien enemy combatants possess speedy trial rights during a war, any deadlines imposed on the Government should properly take into account the exigencies of the war, as well as the delays created by the detainees' own litigating strategies.

xv. The Defense would have this Commission believe that detaining Hamdan for war crimes is no different than detaining an ordinary criminal for trial in U.S. District Court. The two situations, however, are not analogous. Setting aside civil commitment procedures, the basis for detaining U.S. citizens prior to conviction for violations of the criminal code relates to the need to assure their presence at trial and the like. *See, e.g.*, 18 U.S.C. § 3142 (Release or Detention of a Defendant Pending Trial). The paradigm in a time of war is different, however. *Cf. Doggett v. United States*, 505 U.S. 647, 655 (1992) ("[T]he Sixth Amendment right of the accused to a speedy trial has no application beyond the confines of a formal criminal prosecution."). With respect to war crimes, different rules apply, and detentions are permitted, not only to try enemy combatants for war crimes, but to prevent their return to the fray. The accused is being detained as an enemy combatant. That he is also being tried for war crimes does not transmogrify his wartime detention into pretrial detention for an ordinary criminal matter. His detention is that which was approved by the Supreme Court in *Hamdi*, and the Speedy Trial Clause is accordingly inapplicable to it.

xvi. Moreover, as the Court in *Ex parte Quirin*, 317 U.S. 1 (1942), explained, violations of the law of war do not constitute "crimes" or "criminal prosecutions" within the meaning of the Fifth and Sixth Amendments. *See id.* at 40 ("In the light of this long-continued and consistent interpretation we must concluded that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts."). The Speedy Trial Clause is accordingly inapplicable to the accused.

b. Even if the accused were to possess constitutional rights under the Speedy Trial Clause, his detention fully complies with the Sixth Amendment.

i. The accused claims that his detention violates the Sixth Amendment's guarantee "[i]n all criminal prosecutions" of a "speedy and public trial." With respect to the latter requirement of a *public* trial, we note that the MCA clearly guarantees the accused just that. For example, section 949d(d) of the MCA provides that military commissions shall generally be open to the public, subject only to narrow exceptions to protect classified information or to ensure the physical safety of individuals. *See also*

RMC 806(a) ("Except as otherwise provided in the M.C.A. and this Manual, military commissions shall be publicly held."). The requirements of the MCA and Manual for Military Commissions, and the procedures adopted by this military commission, clearly refute the accused's argument that he has been denied a public trial. *Cf. United States v. Lonetree*, 31 M.J. 849, 854 (N.M.C.M.R. 1990) (upholding partial closing of court-martial proceedings to protect classified evidence), *remanded on other grounds*, 35 M.J. 396, 414 (C.M.A. 1992).

ii. As to the Sixth Amendment's requirement in criminal prosecutions of a speedy trial, the Supreme Court has enunciated a four-part test for determining whether this obligation has been met: "whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *Doggett*, 505 U.S. at 651; *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972) ("We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.").

iii. As the Defense notes, the accused was held for approximately two-and-a-half years prior to being charged before a Presidentially-authorized military commission. As described above, however, the Supreme Court's plurality opinion in *Hamdi* fully authorizes non-punitive detention of enemy combatants to prevent their returning to the field of battle. The accused was lawfully detained under this authority, pursuant both to the President's authority under Article II of the Constitution and the AUMF.

iv. The accused's detention following his being charged under the prior and current military commission systems is not attributable to any laches on the part of the Government. Rather, the Government has vigorously attempted to prosecute the accused for his war crimes. The accused, however, has contested these charges, and launched numerous legal challenges to any attempt ever to try him for his crimes. These challenges, even when repeatedly rejected by the courts, have resulted in further delays. Following the accused's eventual success in *Hamdan v. Rumsfeld*, Congress authorized—a mere four months later—an entire system of military commissions, which in turn required the Secretary of Defense to develop procedures to govern it. This the Secretary did, in the 90-day time period established by Congress. The accused was charged less than a month after those procedures were finalized. Since that time, the accused's legal team has filed scores of motions, all in an attempt to prevent this case from *ever* being litigated before a jury. The accused's legal team has erected roadblocks at every stage of these proceedings, and it is difficult to understand how the accused and his counsel can proclaim that they are "shocked, shocked!" that his various machinations have actually resulted in delay. Throughout these proceedings, the Government has attempted to bring this matter expeditiously to trial, and most of the post-charge delay, as the accused in part admits, *see* Def. Mot. at 10, is fully attributable to him. *Cf. United States v. Loud Hawk*, 474 U.S. 302, 316 (1986) (holding that, in the absence of bad faith or dilatory conduct on the part of the Government, delays occasioned in bringing a case to trial based upon

interlocutory Government appeals should not weigh in favor of finding a speedy trial violation).

v. Moreover, under *Hamdi*, the Government is entitled to detain the accused—an enemy combatant captured on a foreign battlefield bearing multiple surface-to-air missiles to be used against U.S. forces or its allies—for the duration of the hostilities. This detention—which has a wholly different basis from ordinary pretrial detention in civilian courts—is permitted irrespective of criminal charges ever being brought against the accused. *See Hamdi*. Since the accused, even in the absence of charges under the MCA, could have been detained for the duration of hostilities, he has suffered no prejudice from his continued detention, notwithstanding that charges were subsequently sworn against him. *See United States v. Marion*, 404 U.S. 307, 313 (1971) ("In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused' . . . ."). This is especially true, given that historically detained enemy combatants have not been tried for their alleged war crimes until after the cessation of hostilities. Here, of course, these proceedings are occurring in the midst of hostilities.

vi. Moreover, to the extent the delay in bringing this matter to trial impacts the parties' ability to present evidence, it is *the Government* that has been prejudiced since it is the Government's burden to prove the accused's guilt beyond a reasonable doubt. *See* 10 U.S.C. § 949*l*(c)(4) ("[T]he burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States."). Thus, even applying the Sixth Amendment analysis from *Doggett* and *Barker*, it is clear that the accused's speedy trial rights have been neither violated nor prejudiced.

c. Conclusion

i. Alien enemy combatants, such as the accused, held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the Sixth Amendment. Moreover, even if the accused were to possess rights under the Speedy Trial Clause, under the standard enunciated by the Supreme Court in *Doggett* and *Barker*, much of the relevant delay is attributable to the accused and the accused has not been prejudiced by it. Accordingly, the accused's speedy trial rights, to the extent he has any, have not been violated.

ii. The Government respectfully requests that the Military Judge rule *both* that the Speedy Trial Clause does not apply to the accused, *and* that, even if it does, the accused's rights have not been violated by his detention.

7. Oral Argument: In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Prosecution believes that the motion to dismiss should be readily denied. Should the Military Judge orders the parties to present oral argument, the Government is prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. **Certificate of Conference:** Not applicable.

10. **Additional Information:** None.

11. **Attachments:** None.

Respectfully submitted,

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